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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. HERBERT JOHN BROWN, Defendant and Appellant.	G041063 (Super. Ct. No. 07CF1898) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Daniel Barrett McNerney, Judge. Affirmed. Motion to augment. Granted.

Kevin D. Sheehy, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting and Meredith A. Strong, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

Defendant Herbert John Brown appeals from the judgment of conviction entered after a jury found him guilty of one count of attempting to commit a lewd act on his then six-year-old daughter and one count of child annoyance as to his then 15-year-old developmentally disabled son. We affirm.

We reject each of defendant's contentions of error during trial and hold (1) the trial court did not err by denying his motion to suppress statements he made to a police detective before he was read his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) because defendant was not in custody at the time the statements were made; (2) the trial court did not abuse its discretion in admitting a photograph found at defendant's residence depicting an adult male sodomizing a five- to seven-year-old girl, which had been altered to block out the genitalia; and (3) defendant's constitutional right against self-incrimination was not violated by a comment made by the prosecutor during closing argument.

FACTS

In May 2007, defendant's then 15-year-old developmentally disabled son, A., lived with his maternal grandmother. After school on May 23, 2007, A. arrived at his grandmother's house around 3:00 p.m. and told her that he wanted to go to the mobilehome where defendant, A.'s mother, and A.'s then six-year-old sister, M., lived.

A.'s grandmother agreed to take him to the mobilehome. She tried to call defendant on the telephone but was not able to reach him because the line was busy. After trying to call defendant for at least 45 minutes, she decided to drive A. to the mobilehome. She watched A. enter the mobilehome through an unlocked door before she drove away.

Inside the mobilehome, A. saw defendant standing with his legs wide open near M. who was lying on her back with her legs "open[ed] wide"; M. was wearing only

a T-shirt. Defendant was wearing only shorts which appeared to A. to be wet; A. saw defendant's erect penis through the shorts.

After A. asked, "Dad, what are you doing with M[.]," defendant said, "nothing" and put on a shirt. A. told M. to put her clothes on and she said, "no." Defendant was standing near his computer; the computer screen displayed a picture of a naked "country girl." A. told his mother what he had seen.

A. testified that defendant had previously shown A. videos and pictures of "naked girls," who were "[j]ust having sex," on the computer in the mobilehome. A. testified defendant also tried to show A. how to masturbate.

On May 31, 2007, Detective Simone Mueller went to defendant's mobilehome to speak with defendant about what had happened the afternoon of May 23. Defendant told her that when A. walked into the mobilehome, defendant had just taken a shower and was "air drying" naked in the living room because it was a warm afternoon. Mueller asked defendant where M. was at the time he was naked in the living room. Defendant responded that she could have been in the bath, in the master bedroom, or running around the house. He said M. could have been naked because she often runs around the house naked after her bath. Defendant said that A. had asked him what he was doing and that he had responded, "nothing." Defendant stated he then "got up" and got dressed.

Mueller asked defendant whether he had pornography on his computer and defendant said that he did. A search of defendant's computer and storage devices recovered 4,169 images depicting child pornography.

PROCEDURAL BACKGROUND

Defendant was charged in an amended information with one felony count of attempting to commit a lewd act upon a child under 14 years old in violation of Penal Code sections 664 and 288, subdivision (a) and one misdemeanor count of child

annoyance in violation of section 647.6, subdivision (a)(1). The trial court denied defendant's motion to suppress the statements he made to Mueller at his mobilehome on the ground she had not read him his *Miranda* rights. Among many evidentiary rulings, the court overruled defendant's objection to the admission of a photograph that was found on his computer, which depicts an adult male sodomizing a five- to seven-year-old girl. The court also denied defendant's motion for a mistrial based on a comment made by the prosecutor during closing argument.

Defendant was found guilty as charged. The trial court imposed the upper prison term of four years on the felony count and suspended sentence on the misdemeanor count.

Defendant appealed. He filed a motion to augment the record with (1) the trial court's June 19, 2009 order correcting defendant's presentence credits nunc pro tunc as of the sentencing hearing on October 3, 2008; (2) the "*nunc pro tunc* minute order for the October 3, 2008" sentencing proceeding, which reflects the correct presentence custody credits; and (3) the amended abstract of judgment filed on June 25, 2009. Defendant's motion is granted.

DISCUSSION

I.

THE TRIAL COURT DID NOT ERR BY DENYING DEFENDANT'S MOTION TO SUPPRESS.

Defendant moved the trial court to suppress the statements he made to Mueller at his mobilehome on the ground he had not been given his *Miranda* warnings before he made those statements. The trial court properly denied the motion because defendant was not in custody at the time he made the statements at issue.

A.

Testimony at the Motion to Suppress Hearing

Mueller's testimony was the only evidence presented at the hearing on defendant's motion to suppress. She testified that on May 31, 2007, she and two police officers went to defendant's mobilehome. Mueller was dressed in plainclothes and arrived in an unmarked police car. The other two officers were dressed in the normal patrol uniform and had travelled to the residence in a patrol car.

Mueller knocked on the door of defendant's mobilehome and defendant opened the door. Mueller asked him if he was "Herbie"; defendant said that he was Herbie. Mueller identified herself as a detective with the Orange Police Department and asked him if she could come inside to talk with him. Defendant replied, "yes" and backed up so that she could walk through the door and into the residence. The other two officers followed Mueller inside the mobilehome.

Upon entering the mobilehome, Mueller asked defendant whether he had any weapons. Defendant said he did not. Mueller told defendant that one of the officers was going to check to make sure he did not have any weapons on his person "for [their] safety." Without being asked to do so, defendant turned to face the wall and put his hands on the wall. One of the officers patted down defendant and confirmed he did not have any weapons.

Mueller asked defendant if he would sit down while they talked so that she "didn't have to worry about him grabbing anything inside the residence." Defendant sat down. Mueller told defendant they had information that there had been "some inappropriate contact between h[im] and his children, and that [she] would like to talk to him about it." Defendant volunteered that "if [she] was going to ask him about molesting his children that he never did."

Mueller told defendant she would like to talk with him at the police station and asked him if he would "come down and talk with [her] there." Defendant told

Mueller he would rather talk at his residence, explaining that he had recently been released from the hospital and was ill. Mueller asked defendant if he was on any medication and defendant said he was not.

Mueller asked defendant questions about his routine. She asked him if he remembered a day recently when A. had come home during the middle of the afternoon. Defendant told Mueller that he had taken a shower and, since it was a warm afternoon, had decided to sit on the couch in the living room while naked to "air dry" and watch television. Mueller asked defendant where M. was while he was air drying naked in the living room. Defendant was "nonspecific," stating that M. could have been in one of a few different places, but he could not remember where. He said she could have been in the bathtub, on the other side of the house playing, or "running around the house naked." Defendant told Mueller that A. had come into the house and had asked defendant what he was doing; defendant had replied, "nothing." Defendant then got up and got dressed. Defendant said his computer was probably on, but he did not know what was displayed on the screen.

Mueller asked defendant about viewing pornography. Defendant said he often looked at pornography but tried to turn it off "when the children come in." She asked him if he had pornography on his computer and he said that he did. She asked him whether he had any child pornography on his computer. She testified that defendant said "something about not wanting to tell [her] without talking to a lawyer." After Mueller asked defendant if he had any child pornography on disks or on any other storage devices, defendant stated, "not that I want to give you without a search warrant." He then asked her to leave.

Defendant was placed in handcuffs. Two more officers arrived and remained outside defendant's mobilehome while Mueller was inside talking with defendant. Defendant was taken to the police station.

Mueller testified that at no time did she or the other two officers inside defendant's mobilehome threaten defendant or draw their guns. She estimated she and defendant spoke for about 10 minutes before defendant asked her to leave. Mueller was the only one who asked defendant questions and she used a "[n]ormal conversational tone"; she did not raise her voice. She did not confront defendant with any evidence or any statements she had been given. Mueller later contacted defendant at the police station and read him his *Miranda* rights. He spoke with her after that advisement.

B.

Applicable Law

"*Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.'" (*Oregon v. Mathiason* (1977) 429 U.S. 492, 495; *People v. Ochoa* (1998) 19 Cal.4th 353, 401 ["'Absent "custodial interrogation," *Miranda* simply does not come into play'"].) "An interrogation is custodial when 'a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' [Citation.] Whether a person is in custody is an objective test; *the pertinent inquiry is whether there was '"'a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.'"'* [Citation.] [¶] Whether a defendant was in custody for *Miranda* purposes is a mixed question of law and fact. [Citation.] When reviewing a trial court's determination that a defendant did not undergo custodial interrogation, an appellate court must 'apply a deferential substantial evidence standard' [citation] to the trial court's factual findings regarding the circumstances surrounding the interrogation, and it must independently decide whether, given those circumstances, 'a reasonable person in [the] defendant's position would have felt free to end the questioning and leave' [citation]."[1] (*People v.*

[1] Defendant argues, "the trial court's analysis was fatally clouded by its substantial, improper reliance upon a subjective evaluation of appellant's state of mind when being interrogated at home," instead of properly applying an objective test; defendant does not

Leonard (2007) 40 Cal.4th 1370, 1400, italics added; see *People v. Ochoa, supra*, at p. 402 ["'Once the scene is . . . reconstructed, the court must apply an objective test to resolve "the ultimate inquiry": "[was] there a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest"'"].)

In determining whether a defendant was in custody for purposes of *Miranda*, "[t]he totality of the circumstances surrounding an incident must be considered as a whole. [Citation.] Although no one factor is controlling, the following circumstances should be considered: '(1) [W]hether the suspect has been formally arrested; (2) absent formal arrest, the length of the detention; (3) the location; (4) the ratio of officers to suspects; and (5) the demeanor of the officer, including the nature of the questioning.'" (*People v. Pilster* (2006) 138 Cal.App.4th 1395, 1403.) "Additional factors are whether the suspect agreed to the interview and was informed he or she could terminate the questioning, whether police informed the person he or she was considered a witness or suspect, whether there were restrictions on the suspect's freedom of movement during the interview, and whether police officers dominated and controlled the interrogation or were 'aggressive, confrontational, and/or accusatory,' whether they pressured the suspect, and whether the suspect was arrested at the conclusion of the interview." (*Id.* at pp. 1403-1404.)

C.

Defendant Was Not "In Custody" During His Conversation with Mueller Inside His Mobilehome.

Here, the totality of the circumstances shows defendant was not in custody during his conversation with Mueller at his mobilehome, and, thus, a *Miranda* advisement was not required. After Mueller, while in the company of the two officers,

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challenge the trial court's factual findings. We do not need to reach defendant's argument challenging the trial court's legal analysis because we review the court's legal conclusion de novo.

knocked on defendant's door and *asked* to speak with him, defendant agreed and stepped aside to allow them entry inside his mobilehome. Although Mueller was accompanied by two other officers, she was the only one to ask defendant questions. She did not accuse him of anything, but informed him she had information that something "inappropriate" was happening between him and his children.

There is nothing in the record to suggest Mueller was aggressive, confrontational, or accusatory; she spoke in a normal conversational tone. She did not confront defendant with evidence against him; the record does not show defendant was subject to any pressure by the officers. Although Mueller had asked defendant to be seated during their conversation (for safety reasons), Mueller had also told defendant she would prefer to talk to him at the police station; defendant, however, declined to go to the police station. He, therefore, exercised some control over the setting of their conversation. No officer threatened defendant or drew his or her gun. Defendant was not told he was unable to leave or otherwise terminate the conversation with Mueller.

Defendant and Mueller's conversation was brief, lasting only about 10 minutes. (*People v. Pilster*, *supra*, 138 Cal.App.4th at p. 1404 ["*Miranda* warnings are not required during the course of a brief detention"].) Defendant was not placed under formal arrest or handcuffed before the end of the conversation. (*Id*. at pp. 1404-1405 [placing an individual in handcuffs is "a distinguishing feature of a formal arrest"].) Furthermore, defendant was not told he was under arrest before the arrest. Defendant's later arrest does not establish, without more, that defendant was in custody during his conversation with Mueller.

Viewing the objective circumstances from a reasonable person's point of view, it cannot be said defendant's movement was restricted to the degree associated with a formal arrest until his conversation with Mueller ended and he was placed in handcuffs. Before that time, considering all these circumstances, we conclude defendant was not restricted in a manner that a reasonable person would consider tantamount to arrest.

Defendant argues he should have been read his rights under *Miranda* because a reasonable person in his position would not have felt at liberty to terminate the "interrogation" and leave. As discussed *ante*, the "pertinent inquiry" in determining custody for purposes of *Miranda* is whether there had been a formal arrest """""or restraint on freedom of movement" of the degree associated with a formal arrest.""""" (*People v. Leonard*, *supra*, 40 Cal.4th at p. 1400; see *People v. Pilster*, *supra*, 138 Cal.App.4th at p. 1403, fn. 1 [issue under *Berkemer v. McCarty* (1984) 468 U.S. 420 "'is *not* whether a reasonable person would believe he was not free to leave, but rather whether such a person would believe he was in police custody of the degree associated with formal arrest'"]; 2 LaFave et al., Criminal Procedure (3d ed. 2007) Interrogation and Confessions, § 6.6(c), pp. 728-729.)

The trial court did not err by concluding a reasonable person in defendant's position would not have believed he or she was in police custody of the degree associated with a formal arrest during his conversation with Mueller.

II.

THE TRIAL COURT DID NOT ERR BY ADMITTING EXHIBIT 23.

Defendant argues the trial court erred by admitting into evidence a photograph that had been found on his computer and depicts an adult male sodomizing a young girl, which was altered by the prosecution to include a black box that blocked out the genitalia in the original image (exhibit 23). Defendant further argues exhibit 23 should not have been admitted under Evidence Code sections 1101, subdivision (b) and 1108 because it is so inflammatory that its prejudicial impact substantially outweighed its probative value within the meaning of Evidence Code section 352. For the reasons discussed in detail *post*, we conclude the trial court did not err.

A.

Evidence Code Sections 1101, 1108, and 352

Evidence Code section 1101, subdivision (a) generally prohibits the admission of evidence of a person's character or a trait of his or her character "when offered to prove his or her conduct on a specified occasion" unless section 1108, or another specifically enumerated code section, provides otherwise. Section 1101, subdivision (b) provides, however, that "[n]othing in this section prohibits the admission of evidence that a person committed a crime" to prove intent.

Evidence Code section 1108, subdivision (a) provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." As a general rule, disposition or propensity evidence offered to prove a defendant's conduct on a specific occasion is not admissible. (*People v. Falsetta* (1999) 21 Cal.4th 903, 911.) "In 1995, the Legislature enacted section 1108 to expand the admissibility of disposition or propensity evidence in sex offense cases" (*ibid*.) because it "determined the need for section 1108 was '"critical" given the serious and secretive nature of sex crimes and the often resulting credibility contest at trial'" (*id.* at p. 918).

In *People v. Falsetta*, *supra*, 21 Cal.4th 903, the defendant argued Evidence Code section 1108 violated his constitutional right to due process. The California Supreme Court disagreed, stating, "'[s]ection 1108 has a safeguard against the use of uncharged sex offenses in cases where the admission of such evidence could result in a fundamentally unfair trial. Such evidence is still subject to exclusion under . . . [Evidence Code] section 352. [Citation.] . . . This determination is entrusted to the sound discretion of the trial judge who is in the best position to evaluate the evidence. [Citation.] *With this check upon the admission of evidence of uncharged sex offenses in prosecutions for sex crimes, we find that . . . section 1108 does not violate the due*

process clause.' [Citation.]" (*People v. Falsetta, supra,* at pp. 917-918; see *People v. Lewis* (2009) 46 Cal.4th 1255, 1288-1289.)

Evidence Code section 352 provides the trial court discretion to exclude evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." The California Supreme Court, in *People v. Falsetta, supra,* 21 Cal.4th at pages 916-917, stated the trial court's "careful weighing process under section 352," before admitting evidence under Evidence Code section 1108, involves consideration of "its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (See *People v. Kipp* (2001) 26 Cal.4th 1100, 1121 [trial court's decision to admit evidence under section 352 is reviewed for abuse of discretion]; *People v. Williams* (1997) 16 Cal.4th 153, 213 [same].)

B.

Hearings Regarding the Admissibility of Exhibit 23

Before trial, the prosecution sought the admission of several pornographic images that were found on defendant's computer. The prosecutor explained to the trial court that a forensic evaluation of defendant's computer resulted in the discovery of tens of thousands of pornographic images; 4,169 of those images were identified as child pornography which varied in the degree of explicitness.

As to the felony count, the prosecution sought to admit the photographs defendant had accessed between 11:30 a.m. and 3:30 p.m. on May 23, 2007, to show

what defendant had been viewing or accessing before and after M. got home from school that day. Although that group of images depicted children in sexually provocative positions, none showed any child engaged in a sexual act with another person. The court allowed the prosecution to admit eight photographs from this group which had been accessed around 3:30 p.m. on May 23. The court also ruled that the prosecution could select one of the images, which had been accessed earlier in the day on May 23 for admission into evidence as well. Defendant does not challenge the admission of the images that had been accessed on May 23.

The prosecution also sought the admission of some photographs which depicted young girls involved in a sexual act with adult men, to (1) prove, under Evidence Code section 1101, subdivision (b), defendant's intent to attempt to molest M. on May 23; (2) show defendant's propensity to engage in sexual misconduct involving young girls; and (3) corroborate A.'s testimony. Although those photographs were found on defendant's computer, no information regarding when they were accessed was available.

The trial court ruled that only one of those photographs would be admitted. After a further hearing about which image would be admitted, at the prosecution's request and over defendant's objection, the court ruled it would admit exhibit 23 into evidence, which depicted an adult male sodomizing a girl appearing to be five to seven years old and was altered to block out all genitalia.

C.

The Trial Court Did Not Err by Admitting Exhibit 23.

The trial court did not abuse its discretion in admitting exhibit 23. Exhibit 23 was certainly probative of the issue of defendant's intent to attempt to commit a lewd act upon M., within the meaning of Evidence Code section 1101, subdivision (b). In *People v. Memro* (1995) 11 Cal.4th 786, 811, the defendant was charged with, inter alia, the murder of a seven-year-old boy. Physical evidence and statements by the

defendant suggested he had attempted to sodomize the boy. (*Ibid.*) The prosecution therefore pursued a felony-murder theory of guilt based on the premise the killing occurred in the commission of a lewd act on the boy in violation of Penal Code section 288. (*Id.* at p. 861.)

Over the defendant's objections, the trial court admitted into evidence under Evidence Code section 1101, subdivision (b), sexually explicit stories, and photographs and drawings of males ranging in age from prepubescent to young adult, which had been in defendant's possession. (*People v. Memro*, *supra*, 11 Cal.4th at p. 864.) The Supreme Court affirmed the admission of this evidence, stating, "the photographs were admissible to show defendant's intent to molest a young boy in violation of [Penal Code] section 288." (*Ibid.*) The Supreme Court explained: "Although not all were sexually explicit in the abstract, the photographs, presented in the context of defendant's possession of them, yielded evidence from which the jury could infer that he had a sexual attraction to young boys and intended to act on that attraction." (*Id.* at pp. 864-865 [citing *People v. Bales* (1961) 189 Cal.App.2d 694, 701, in which nude photograph of molestation victim was admissible to show lewd intent].) The court stated: "The photographs of young boys were admissible as probative of defendant's intent to do a lewd or lascivious act with [the seven-year-old boy]." (*People v. Memro*, *supra*, at p. 865.)

Exhibit 23 was also relevant to show, as permitted by Evidence Code section 1108, defendant's commission of another sexual offense (possession of child pornography) and thus his propensity to engage in sexual misconduct involving young girls.

Defendant argues exhibit 23's probative value is diminished because it was cumulative to trial testimony describing it and other images found in defendant's residence. The record shows, however, the trial court was aware that testimony regarding the pornography found in defendant's residence would be offered at trial and considered

such testimony in conducting the weighing required under Evidence Code section 352. (See *People v. Medina* (1995) 11 Cal.4th 694, 754 ["we have often rejected the argument that photographs of the murder victim must be excluded merely because they are cumulative to other evidence in the case"].)

Defendant argues exhibit 23's probative value was further diminished because it was unknown when defendant had last accessed that particular image. While the court should, and did, take into consideration the lack of information as to when defendant had last accessed exhibit 23, "[n]o specific time limits have been established for determining when an uncharged offense is so remote as to be inadmissible" (*People v. Branch* (2001) 91 Cal.App.4th 274, 284).

Defendant also argues exhibit 23's depiction of an adult male sodomizing a young girl is so inflammatory that its prejudicial impact substantially outweighs its probative value. In *People v. Memro, supra*, 11 Cal.4th 786, 865, the Supreme Court rejected a similar argument, stating: "Defendant also contends that the items were substantially more prejudicial than they were probative. Hence, in his view, their introduction was barred by Evidence Code section 352. We find no abuse of discretion in admitting the magazines or the photographs. To be sure, some of this material showed young boys in sexually graphic poses. It would undoubtedly be disturbing to most people. But we cannot say that it was substantially more prejudicial than probative, for its value in establishing defendant's intent to violate [Penal Code] section 288 was substantial. The court balanced the items' evidentiary worth against their potential to cause prejudice and determined that the former substantially outweighed the latter. Its decision was reasonable."

Here, the record shows the trial court carefully weighed exhibit 23's probative value against its prejudicial impact. Exhibit 23 is disturbing in its depiction of an adult male sodomizing a five- to seven-year-old girl. However, the image was rendered less graphic before it was admitted into evidence, having been altered to cover

all genitalia with a black box. Furthermore, the trial court rejected the prosecution's request to admit other pornographic images involving adults engaging in sexual misconduct with children, which were found at defendant's residence. As defendant was on trial for, inter alia, attempting to commit a lewd act on his then six-year-old daughter, the court permitted the admission of a *single* representative image—that showed an adult male's sexual misconduct with a five- to seven-year-old girl—from defendant's vast collection of child pornography. The prosecution was not required to limit its presentation of evidence regarding defendant's child pornography collection to testimony describing it.

On this record, the trial court's decision to admit exhibit 23 was reasonable and did not constitute error.

III.

THE PROSECUTOR DID NOT VIOLATE DEFENDANT'S CONSTITUTIONAL RIGHT AGAINST SELF-INCRIMINATION.

Defendant argues the prosecutor made statements which violated defendant's right against self-incrimination under the Fifth Amendment to the United States Constitution. He contends that in the closing argument, the prosecutor improperly commented on defendant's failure to testify and the trial court erred by denying his motion for a mistrial asserting prosecutorial misconduct. For the reasons discussed *post*, we find no error.

In *Griffin v. California* (1965) 380 U.S. 609 (*Griffin*), the United States Supreme Court held the prosecutor may not comment on a defendant's failure to testify on his or her own behalf. The holding in *Griffin* "does not, however, extend to bar prosecution comments based upon the state of the evidence or upon the failure of the defense to introduce material evidence or to call anticipated witnesses." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1339.)

In *People v. Bradford*, *supra*, 15 Cal.4th at page 1338, the defendant argued the prosecutor committed *Griffin* error by noting the defendant's failure to call any witnesses or produce any evidence pointing to his innocence. The prosecutor mentioned specifically the defendant's failure to present an expert witness and alibi witnesses. (*Id.* at p. 1339.) The California Supreme Court rejected the claim of *Griffin* error because the prosecutor's comments on the defendant's failure to call witnesses or present evidence "cannot fairly be interpreted as referring to defendant's failure to testify." (*Ibid.*) The court stated, "[n]either the general comment directed to the lack of defense evidence or testimony, nor the more particularized comments regarding the possibly bloodstained mat, the coroner's opinion, or the absence of alibi for a particular time period, would have required defendant to take the stand." (*Ibid.*)

In *People v. Lancaster* (2007) 41 Cal.4th 50, 84, during closing argument, the prosecutor "reminded the jury about the Liquid-Plumr bottle found at the scene, and observed: 'It was new, it still had liquid in it, and had the defendant's prints all over it. There's been no explanation offered as to how they possibly could have been there.'" The defendant argued the prosecutor's comment constituted *Griffin* error. (*Ibid.*) The Supreme Court rejected the defendant's argument, stating, "the prosecutor's statement was a fair comment on the state of the evidence, rather than a comment on defendant's failure to personally provide an alternative explanation." (*Ibid.*)

Here, defendant contends the prosecutor committed *Griffin* error during closing argument when she discussed M.'s reluctance during the Child Abuse Services Team interview to discuss what had happened on May 23, as follows: "When the [Child Abuse Services Team] interviewer said to her, 'I know you keep getting upset when we talk about your brother coming in on you,' okay, 'when your'—'did he walk in on you once or more than once?' 'Oh, just once.' She's corroborating that he walked in on her and she didn't have any clothes on and told her to put her clothes on. That's corroboration, okay? She doesn't want to talk about this. She is six years old, okay?

Only she knows exactly what happened that day. *Well, she and the defendant, okay?*" (Italics added.)

The prosecutor's comment reflected the state of the evidence—that M. and defendant knew what happened on May 23. The evidence at trial, by way of M.'s testimony, A.'s testimony, and Mueller's testimony regarding defendant's admissions on May 31, showed that defendant and M. were together during the afternoon of May 23. The comment could not be reasonably interpreted to comment on defendant's failure to testify at trial or urge the jury to infer guilt from his silence. (See *People v. Lewis* (2001) 25 Cal.4th 610, 671 ["Nor is there a reasonable likelihood that the jury understood the prosecutor's remarks as an improper comment on defendant's failure to testify"]; *People v. Clair* (1992) 2 Cal.4th 629, 663 ["There is not a reasonable likelihood that any of the comments could have been understood, within its context, to refer to defendant's failure to testify"].) The prosecutor's comments, therefore, did not violate defendant's constitutional right against self-incrimination.

DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.